

**REMARKS**

**Request for Withdrawal of Finality**

Applicant requests the withdrawal of the final status of the June 15, 2005 Office Action. The June 15, 2005 Office Action includes a new rejection of claims 1, 293, 294, 34, 295, 296, 65, 297, 298, 97, 100, 299, 130, 133, and 300 under 35 U.S.C. § 103(a) as being unpatentable over Wild (U.S. Patent No. 5,056,685) in view of Meshberg (U.S. Patent No. 4,008,830). The Section 103(a) rejection of independent claims 1, 34, and 65 based on Wild in view of Meshberg was a new ground of rejection which was not necessitated by any amendment of these claims and therefore the final rejection was premature and must be withdrawn. See M.P.E.P. § 706.07(a), (c), (d). Claims 1, 34, and 65 were not amended in the September 3, 2004 Response to Office Action -- they were the originally filed claims. Subsequent to the September 3, 2004 Response, this completely new ground of rejection was added. Under M.P.E.P. § 706.07(a), a subsequent Office Action cannot be made final if the examiner introduces a new ground of rejection that is neither necessitated by applicant's amendment of the claims nor based on information submitted in an information disclosure statement (IDS) filed during the period set forth in 37 C.F.R. 1.97(c). There was no amendment to claims 1, 34, and 65 and no IDS was filed during the relevant period. Therefore, the finality of the June 15, 2005 Office Action must be withdrawn. If the Examiner disagrees, he is requested to notify Applicant's counsel immediately so that Applicant may consider filing a petition to the Group Director.

Since the previous Office Action was incorrectly designated as being final, the present response should be entered even if it might raise any new issue.

**Further Remarks**

By this Amendment, Applicant cancels 4, 18, 51, 67, 81, 82, 97-226, 294, 296, and 299-302 without prejudice, and amends claims 1, 19, 34, 37, 52, and 65. Applicant respectfully submits that the pending claims are in condition for allowance.

Applicant gratefully acknowledges the Examiner's withdrawal of: the objection to the title of the invention; the objections to claims 37, 44, 45, 152, and 182; the rejection of claims 27, 60, 90, 122, 156, and 186 under 35 U.S.C. § 112, second paragraph; and the rejection to claims 31 and 190 as being substantial duplicates.

In the Office Action, claims 97-113, 115-129, 130-146, 148-160, and 293-302 were rejected under 35 U.S.C. § 112, first paragraph, as allegedly containing subject matter which was not described in the specification. With respect to claims 97 and 130, the Examiner asserted that the limitation "the opening being the only inlet for the flow of product into the dip tube", which was added to claims 97 and 130 in the previous response, does not comply with § 112, first paragraph. Although claims 97 and 130 have been deleted, the same limitation has been added to claims 1 and 34 by the above Amendment, so Applicant herein provides the following comments regarding this rejection.

Applicant respectfully submits that the Section 112, first paragraph rejection is erroneous. One of ordinary skill in the art would clearly understand that the exemplary embodiments described in the specification and shown in the drawings of the present application include a dip tube having a single opening at the free end that acts as the only inlet for the flow of product. The specification does not need to expressly state the absence of any additional openings in order to claim that the tube only has a single

opening which acts as an inlet. In all of the cross sectional views of Figs. 2-7, the drawings clearly show an unperforated tube. Furthermore, one of ordinary skill in the art would understand that certain exemplary operational characteristics described in the application would be practiced with an unperforated tube. For example, the specification at page 21, paragraphs 94 and 95 refers to immersing only the free end 14 of the dip tube 13 in the product, thus, inherently and implicitly disclosing that the opening at the free end 14 is the only opening in the exemplary dip tube 13 shown in the Figs. 3A-3B. Furthermore, the specification refers to “maintaining the free end of the dip tube in contact with the product.” (Specification, paragraph 63). This issue is only relevant to an unperforated tube. Finally, the Examiner’s interpretation of Applicant’s disclosure is inconsistent with his interpretation of the disclosures of the references for the § 102 and § 103 rejections. For example, on page 6 of the Office Action, the Examiner states that Meshberg teaches a dip tube (37) “having only a single inlet into the tube”, even though Meshberg does not explicitly mention a dip tube having only a single inlet. If Meshberg teaches a dip tube having only a single inlet, then Applicant’s disclosure teaches and supports that same limitation. The Examiner’s assertion that Meshberg (which shows a dip tube with cross-sections similar to Applicant’s) discloses a dip tube with a single inlet clearly shows that Applicant’s disclosure supports the claim language.

With respect to the Section 112, first paragraph, rejection of claims 293-302, the Examiner states that the recitation of the dip tube being “unperforated” and the opening at the free end of the dip tube being the only inlet are “not supported by the disclosure as originally filed for the reasons as explained above.” The Examiner’s assertion that

an “unperforated tube” is not supported in Applicant’s disclosure, even though only an unperforated tube is shown in the drawings, is clearly erroneous for reasons at least similar to those discussed above. (Moreover, contrary to the Examiner’s characterization of “unperforated” as being a negative limitation, it is a positive limitation.) Consequently, the Section 112, first paragraph, rejection is improper and should be withdrawn.

In the June 15, 2005 Office Action, the Examiner withdrew some of the previous art-based rejections. (Applicant greatly appreciates those withdrawals.) However, many of the claim rejections set forth in the final Office Action remain the same as in the previous Office Action.

For example, claims 1, 2, 7-10, 13, 20, 21, 29-33, 34, 35, 40-43, 46, 53, 54, and 62-64 were rejected under 35 U.S.C. § 102(b) as being anticipated by U.S. Patent No. 5,505,338 to Gueret (“Gueret”). Applicant respectfully submits that the rejection of independent claims 1 and 34, along with the dependent claims, should be withdrawn because Gueret does not disclose a variety of limitations in the amended claims. In particular, Gueret does not disclose a device “configured so that, as product is pumped from the interior of the pouch, a volume defined by the interior of the pouch above the free end of the dip tube is substantially equal to a volume defined by the interior of the pouch below the free end of the tube,” as recited in amended claim 1. Nor does Gueret disclose or suggest a “cross sectional area defined by the pouch [being] at a maximum substantially at the mid-point of the axial height of the pouch, and decreas[ing] gradually away from the mid-point,” as recited in amended claim 34. Additionally, Gueret does not disclose or suggest, among other things, a dip tube having an opening at the free

end of the tube, the opening being the only inlet for the flow of product into the dip tube, as recited in amended claims 1 and 34. Although Applicant disagrees with the Examiner's assertion that Gueret's "antitrapping member" 27 is a dip tube, claims 1 and 34 are allowable over Gueret for all of the additional reasons stated above.

Claims 97, 98, 101-106, 109, 116-118, 121, 122, 124-129, 130, 131, 134-139, 142, 149-151, 154, 155, 157-160, 299, and 300 were rejected under 35 U.S.C. § 102(b) as being anticipated by U.S. Patent No. 4,322,020 to Stone ("Stone"); claims 97-99, 103-106, 116, 117, 124, 125, 128, 129, and 299 were rejected under 35 U.S.C. § 102(b) as being anticipated by Meshberg (U.S. Patent No. 4,008,830); and claims 130-132, 134-146, 151, 152-154, 156, 157, 161, 162, 164-176, 181-184, 187, 191, and 192 were rejected under 35 U.S.C. § 102(b) as being anticipated by JP 09077136A to Kogyosho ("Kogyosho"). Although Applicant does not necessarily agree with those Section 102(b) rejections, all of those rejected claims have been canceled, thereby obviating the rejections.

The remaining rejections are based on Section 103.

Claims 1-17, 22-50, 53-80, 83-96, 161-176, and 179-192 were rejected under 35 U.S.C. § 103(a) based on Kogyosho in view of Gueret. Kogyosho fails to disclose or suggest a large number of claim limitations recited in the independent claims, such as: a dip tube having a free end located substantially at a mid-point of an axial height of the pouch (claims 1, 34, and 65); a dip tube having a single inlet at its free end (claims 1 and 34); a pouch with a cross sectional area defined by the pouch being at a maximum substantially at the mid-point of the axial height of the pouch and decreasing gradually away from the mid-point (claims 34 and 65); or a configuration so that, as product is

pumped from the interior of the pouch, a volume defined by the interior of the pouch above the free end of the dip tube is substantially equal to a volume defined by the interior of the pouch below the free end of the dip tube (claims 1 and 65). Gueret fails to make up for the deficiencies of Kogyosho. For example, Gueret clearly does not teach or suggest a dip tube having a single inlet at its free end. Instead, the anti-trapping member of Gueret is in the form of fins defining slot-shaped gaps, or in the alternative, a perforated tube. Nor does Gueret teach or suggest a pouch with a cross sectional area being at a maximum substantially at the mid-point of the axial height of the pouch and decreasing gradually away from the mid-point. Nor does Gueret teach or suggest that a volume defined by the interior of the pouch above the free end of the dip tube is substantially equal to a volume defined by the interior of the pouch below the free end of the dip tube. Even if Gueret did teach any of these limitations, there would be no motivation or suggestion to combine the references, and the Examiner has not asserted any.

Claims 101, 102, 107, 108-113, 118-121, 123, 301, and 302 were rejected under 35 U.S.C. § 103(a) based on Meshberg in view of Kogyosho. Although Applicant does not necessarily agree with this rejection, all of those rejected claims have been cancelled, thereby obviating the rejection.

In light of the cancellation of claims, a number of other rejections have been obviated even though Applicant does not necessarily agree with them. Such rejections include: the rejection of claim 82 under 35 U.S.C. § 103(a) based on Kogyosho and Gueret and further in view of U.S. Design Patent D338,828 to Segati ("Segati"); the rejection of claims 97, 115, 130, 133, 148, and 300 under 35 U.S.C. § 103(a) based on

Ellion et al. (U.S. Patent No. 5,497,911) in view of Meshberg; and the rejection of claim 178 under 35 U.S.C. § 103(a) based on Kogyosho in view of Segati.

Although the anticipation rejection based on Ellion et al. was properly withdrawn, claims 1, 19, 34, and 54 were rejected under 35 U.S.C. § 103(a) as being unpatentable over Ellion et al. in view of Gueret. Applicant respectfully submits that the Section 103(a) rejection based on Ellion et al. and Gueret should be withdrawn because any combination of those references would fail to teach or suggest all of the elements recited in independent claims 1 and 34, as amended. For example, neither Ellion et al. nor Gueret teaches or suggests at least: a dip tube having a single inlet at its free end (claims 1 and 34); a pouch with a cross sectional area defined by the pouch being at a maximum substantially at the mid-point of the axial height of the pouch and decreasing gradually away from the mid-point (claim 34); or the device being configured so that, as product is pumped from the interior of the pouch, a volume defined by the interior of the pouch above the free end of the dip tube is substantially equal to a volume defined by the interior of the pouch below the free end of the dip tube (claim 1). Even if Ellion et al. or Gueret did teach any of these limitations, there would be no motivation or suggestion to combine the references, and none is asserted in the Office Action.

Claims 1, 293, 294, 34, 295, 296, 65, 297, 298, 97, 100, 299, 130, 133, and 300 were rejected under 35 U.S.C. § 103(a) based on Wild (U.S. Patent No. 5,056,685) in view of Meshberg. Wild discloses a spraying device for a bottle-shaped container (10) with a refill pouch (1), a connection tube (3), and a sleeve (9). Wild does not teach or suggest many of the limitations of amended claims 1, 34, and 65, discussed above, such as: a configuration so that, as product is pumped from the interior of the pouch, a

volume defined by the interior of the pouch above the free end of the dip tube is substantially equal to a volume defined by the interior of the pouch below the free end of the dip tube (claims 1 and 65); and a pouch with a cross sectional area defined by the pouch being at a maximum substantially at the mid-point of the axial height of the pouch and decreasing gradually away from the mid-point (claims 34 and 65). Since neither of these references teaches these claim limitations, any attempt at combining the references would not result in the claimed subject matter. Furthermore, there would not be any suggestion or motivation to combine.

Applicant's remarks relating to the claim rejections are primarily focused on the pending independent claims (1, 34, and 65). The dependent claims that depend from the above discussed independent claims are allowable at least due to their dependency from the independent claims, in addition to the additional limitations recited in the dependent claims.

Applicant respectfully requests the reconsideration of this application, the withdrawal of all the claim rejections, and the timely allowance of the pending claims.

The Office Action contains numerous statements reflecting characterizations of the claims and cited art. Regardless of whether any such statement is addressed herein, Applicant declines to subscribe to any statement or characterization in the Office Action.

In Applicant's previous response filed on September 3, 2004, Applicant requested a copy of the PTO 1449 that was indicated as attached to the April 6, 2004 Office Action. The Examiner does not appear to have attached a copy of the PTO 1449 to the June 15, 2005 Office Action nor did the Office Action Summary of the




June 15, 2005 Office Action indicate that such document was attached. Applicant again requests a copy of the PTO 1449 indicating that the listed documents were considered by the Examiner.

If there is any fee due in connection with the filing of this response, please charge the fee to our Deposit Account No. 06-0916.

Respectfully submitted,

FINNEGAN, HENDERSON, FARABOW,  
GARRETT & DUNNER, L.L.P.

Dated: October 17, 2005

By:   
Troy E. Grabow  
Reg. No. 43,440